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December 21, 2005

VIA U.S. MAIL

John Minan, Esq.
Chairman
California Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court, Suite 100
San Diego, California 92123-4340

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126;
Renewed Request That San Diego Unified Port District
Be Named as a Discharger

Dear Mr. Minan:

For the reasons set forth below, BAE Systems San Diego Ship Repair Inc. ("BAE Systems"), formerly Southwest Marine, Inc., renews its previously stated request that the San Diego Unified Port District "(Port District") be named as a "discharger" in the above-captioned Tentative Cleanup and Abatement Order ("TCAO").

The reasons BAE Systems has previously made this request are straightforward and well known to the Regional Board. The Port District is the owner and lessor of the BAE Systems facility that is a portion of the "Shipyard sediment site" addressed by the TCAO. As stated in BAE Systems' letter to John Robertus dated November 12, 2003, BAE Systems is only the current tenant doing business at its 19-acre leasehold, and has been conducting operations at the site only since 1979. San Diego Marine Construction Company ("SDMC") conducted ship repair and other industrial operations at the site from at least the 1920s until 1979, a substantially longer period than that of BAE Systems' operations and a period in which pollution prevention and abatement practices were much less stringent than post-1979 practices. SDMC's parent companies, Campbell Industries and Marine Construction and Design Company ("MARCO"), are the corporate successors of SDMC.

Based on these uncontested historical facts, BAE Systems requested that the Regional Board name as dischargers both SDMC and its corporate successors, as the prior operators and lessees of the property, and the Port District, as the owner and lessor of the property both now and during the period of SDMC's operations. BAE Systems' reason for wanting the Port District named as a discharger in addition to the former lessees was to ensure that in the event the former

lessees are unable or unwilling to assume responsibility for pre-1979 contamination at the BAE Systems leasehold, another responsible party – the Port District as owner and lessor – will be available and responsible for that contamination.

In response to Regional Board Investigation Orders Nos. R9-2004-0026 and R9-2004-0027, the Port District submitted a letter dated July 15, 2004 arguing that it should not be named as a discharger, or in the alternative, should be designated as only "secondarily liable" for the contamination at the BAE Systems leasehold. In the TCAO, the Regional Board named Campbell Industries and MARCO as dischargers, but did not name the Port District. In subsequent procedural rulings, the Regional Board has named the Port District as a "designated party" entitled to participate on an equal footing with named dischargers in all pending disputes over the TCAO, but still has not named the Port District as a discharger. The Regional Board has not explained its reasons for declining to name the Port District as a discharger, but may have accepted the Port District's arguments that it is only "secondarily liable" and thus, have decided that naming Campbell Industries and MARCO is sufficient.

As already stated, BAE Systems' concern is that some financially viable and legally responsible party be involved in this proceeding to be held accountable for pre-1979 contamination on the BAE Systems leasehold. If Campbell Industries and/or MARCO were participating in this proceeding and appeared willing and able to assume responsibility for pre-1979 contamination, BAE Systems would be satisfied that the issue of the Port District's co-responsibility for that contamination could be held in abeyance. Unfortunately, however, it seems clear that Campbell Industries and MARCO have decided to ignore the TCAO and shun this proceeding. All the other dischargers named in the TCAO have filed comments and appeared at the Regional Board hearings relating to the TCAO. MARCO and Campbell Industries have made no appearances and Campbell Industries' sole written comment, in a letter to John Robertus dated March 5, 2004, was an assertion that it "has no information pertaining to, and has found no records of, any alleged MARCO and/or Campbell Industries operations within or adjacent to the current Southwest Marine Leasehold from 1914-79, or any other time." In an article in the San Diego Daily Tribune dated April 9, 2003, concerning Campbell Industries' liability for costs of remediation at the nearby "Hilton Hotel" site on San Diego Bay, Campbell Industries' General Manager H. Allen Fernstrom is quoted as saying that Campbell Industries "would file bankruptcy" if it were found liable for contamination at that site. (Attachment 1).

BAE Systems respectfully submits that it is now clear that neither Campbell Industries nor its parent MARCO intends to participate in this proceeding or to accept responsibility for pre-1979 contamination at the BAE Systems leasehold. It also appears questionable whether either company is financially viable. Therefore, it is necessary for the Regional Board to reconsider its previous decision, and to name the Port District as a discharger with respect to such pre-1979 contamination.

BAE Systems does not necessarily accept, but sees no reason to dispute, the Port District's arguments that it is only "secondarily liable" for contamination caused by its tenants. It is important to emphasize, however, that BAE Systems is not liable *at all* for the pre-1979 contamination at its leasehold; the Port District's liability is "secondary," if at all, only to that of

the pre-1979 tenant SDMC and its corporate successors Campbell Industries and MARCO. In its July 15, 2004 letter in response to Investigation Orders R9-2004-0026 and 0027, the Port District makes certain factual assertions and legal arguments that attempt to establish, contrary to the foregoing, that BAE Systems either accepted responsibility for the pre-1979 contamination at its leasehold, or is legally obligated to defend and indemnify the Port District against any liabilities for such contamination. The Port District's factual assertions are misleading at best, and its legal arguments are wholly without merit.

The Port District asserts that "[i]n 1979, Southwest Marine took over the prior lease between the Port and Southwest Marine's predecessor-in-interest, San Diego Marine Construction Company ("SDMC"). . . SDMC operated until its successor, Southwest Marine took over in 1979. . . ." July 15, 2004 letter at p. 15. These statements are blatantly untrue. As the Port District is certainly aware, Southwest Marine did not "take over" the prior lease between the Port District and SDMC. On the contrary, the record is clear that the Port District terminated the prior lease with SDMC effective August 31, 1979, and accepted a surrender of the lease and the leased premises from SDMC. (Attachment 2). The Port District then entered into an entirely new lease with Southwest Marine, effective September 1, 1979. (Attachment 3). This sequence of lease termination followed by a new lease provides no basis for deeming Southwest Marine the "successor" of SDMC, or SDMC Southwest Marine's "predecessor-in-interest"; and it is simply untrue to say that Southwest Marine "took over the prior lease."

The Port District next makes the far-fetched argument that an "Acceptance of Premises" clause in its lease with Southwest Marine somehow constituted an assumption by Southwest Marine of any and all environmental liabilities associated with pre-existing contamination on the leasehold. This clause, which was not in the 1979 lease but was added in a first amendment to the Agreement on April 23, 1985, read as follows:

> "38. ACCEPTANCE OF PREMISES: By signing this Lease, Lessee represents and warrants that it has independently inspected the premises and made all tests, investigations and observations necessary to satisfy itself of the conditions of the premises. Lessee agrees that it is relying solely on such independent inspection, tests, investigations and observations in making this Lease. Lessee further acknowledges that the premises are in the condition called for by this Lease, that Lessor has performed all work with respect to premises and that Lessee does not hold Lessor responsible for any defects in premises."
>
> *Id.* at pp. 15 - 16.

There is obviously nothing in this clause that even refers to environmental conditions or contamination, or that suggests any attempt to assign or allocate legal responsibility for such contamination. Such contractual assignments, assumptions, and allocations of liability for environmental conditions are customary and can be accomplished by clear, well-drafted contract provisions – but this is not such a provision. This provision clearly relates only to the suitability

of the premises for the lessee's intended purposes, and provides that the lessee has no right to demand improvements from lessor.

The Port District's third argument is as follows:

> Southwest Marine also expressly agreed to indemnify and hold the Port harmless for any liability "resulting directly or indirectly from granting and performance of [the] lease or arising from ***the use and operation*** of the leased premises ***or any defect in any part thereof***." *Id.* at ¶ 21. Thus, Southwest Marine expressly represented and agreed, at the time it entered into its Lease, that it was satisfied with the condition of the premises, that the Port had no responsibility for the then-existing conditions on the premises, and that Southwest Marine would indemnify the Port for any liability arising from Southwest Marine's operations and for any defects in the premises.

Id. at p. 16 (emphasis in the 2004 letter, not in the quoted lease).

The Port District bases its indemnity claim on an incomplete and misleading quotation from the indemnity clause that was in its lease with BAE Systems between 1979 and 1997. Contrary to the Port District's statement that the clause committed BAE Systems to indemnify the Port District against "any liability," the indemnity clause in effect from 1979 to 1997 *in fact* was expressly limited to liabilities for "damage to property" and "injury or death of any person or persons," in either case "resulting from the use and operation of the Leased premises or any defect in any part thereof." The Port District's liability under California Water Code § 13304 for necessary costs of remediation on its leased property is not a liability for "property damage" or "injury or death of any person." Nor, with respect to contamination existing prior to BAE's tenancy in September 1979, does the Port District's liability under § 13304 arise from BAE Systems' use of the leased premises or from any defect in the leased premises.

The Port District's indemnity argument is particularly misleading in that it is based on an indemnity clause that no longer exists in its current lease with BAE Systems. The Port District and BAE Systems entered into a second amendment to the subject lease on November 18, 1997 which replaced certain lease provisions and added others. One of the lease provisions that was replaced was paragraph 21, the "Hold Harmless" provision. The new provision, which has been in effect since November 18, 1997, reads as follows:

> 21. HOLD HARMLESS: Lessor, and its agents, officers, and employees shall, to the full extent allowed by law, be held by Lessee free and harmless from and indemnified against any liability pertaining to or arising out of the use and operation of the premises by Lessee and any costs or expenses incurred on account of any claim or claims therefore, including reasonable attorney's fees. Nothing herein is intended to exculpate Lessor from its sole active negligence or willful misconduct.

This clause clearly limits BAE Systems' indemnification of the Port District solely to liabilities "arising out of the use and operation of the leased premises by lessee [BAE Systems]." This indemnity is in some respects broader than the one it replaced: it is not limited to property damage and personal injury, and so could extend to liabilities arising under § 13304. Because it is expressly limited to liabilities arising out of BAE's operations on the leased premises, however, it obviously does not indemnify the Port District against liabilities resulting from contamination attributable to operations on the leased premises prior to September 1979.

The November 18, 1997 second amendment to the lease also added a new clause that explicitly addresses the issue of responsibility for "hazardous substances" and "contaminants," including potential responsibility to perform remedial actions such as those that may be required in a final version of the TCAO. That clause, paragraph 44 of the amended lease, is included as Attachment 4. Like the "Hold Harmless" clause, quoted above, paragraph 44 provides that BAE Systems' responsibilities and liabilities arising out of or with respect to such "contaminants" are expressly limited to "Contaminants arising out of the occupancy or use of the leased premises by lessee [BAE Systems]."

BAE Systems respectfully submits that these two provisions of its *current* lease specifically and conclusively define the scope of BAE Systems' responsibility with respect to contamination on the leased premises. BAE Systems is wholly responsible for any such contamination caused by its own occupancy or use of the leased premises, and is obliged to defend and indemnify the Port District against any liability arising out of BAE Systems' use and occupancy of the leased premises. BAE Systems has no liability or responsibility whatsoever with respect to contamination that was not caused by its own use and occupancy of the premises, including but not limited to any contamination already existing at the time BAE Systems first began to use and occupy the premises in September 1979; and BAE Systems certainly has no obligation to defend or indemnify the Port District with respect to liabilities arising out of such pre-September 1979 contamination.

The entities legally responsible for pre-1979 contamination on and attributable to the BAE Systems leasehold are SDMC, Campbell Industries, MARCO, and the Port District. Because the former tenants have refused to participate in this proceeding and may be insolvent, and the Regional Board has not named the Port District as a discharger, there is currently no party to this Regional Board proceeding that is designated as responsible for, or otherwise acknowledges that it is accountable for, the pre-1979 operations on the BAE Systems leasehold and any resulting contamination. It is not in the Regional Board's interests, or in the other participating dischargers' interests, or in the public interest for a final TCAO to be adopted with such a conspicuously "empty chair" among the ranks of named dischargers who will be expected to fund the work that will be required. BAE Systems has no intention of funding, even provisionally, the share of remediation costs that is attributable to pre-1979 contamination at its leasehold, and doubts that any other named discharger intends to do so either. It would be a shame if, when all the scientific and technical disputes are resolved and a final CAO is adopted, its implementation could be delayed due to the absence of a key responsible party and the potential need to pursue litigation to secure that party's participation.

For all the foregoing reasons, BAE Systems respectfully requests that the San Diego Unified Port District be named as a discharger in this matter, with respect to contamination attributable to operations on the BAE Systems leasehold prior to September 1, 1979.

Respectfully submitted,

MCKENNA LONG & ALDRIDGE LLP

By: _____
Christian Volz
Attorneys for BAE Systems
San Diego Ship Repair Inc.

CV/gmp

cc: Service List, attached

SF:27198945.1

Service List

Re: Tentative Cleanup and Abatement Order No. R9-2005-0126

Mr. Michael Chee
National Steel and Shipbuilding Co.
Post Office Box 85278
San Diego, CA 92186-5278

Mr. David Merk
Director of Environmental Services
Port of San Diego
Post Office Box 120488
San Diego, CA 92112

Mr. Scott Tulloch
City of San Diego
Metropolitan Wastewater Department
9192 Topaz Way
San Diego, CA 92123

Mr. H. Allen Fernstrom
Marine Construction and Design Co.
2300 West Commodore Way
Seattle, WA 98199

Mr. Roy Thun
BP West Coast Products LLC
6 Centerpointe Drive
La Palma, CA 90623-1066

Mr. David Barker
Shipyard Sediment Site Cleanup Team
San Diego Regional Water Quality
Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 92123-4340

Mr. Sandor Halvax
BAE Systems San Diego Ship Repair Inc.
Post Office Box 13308
San Diego, CA 92170-3308

Mr. Brian Gordon
Department of the Navy
Environmental Department N45
Commander Navy Region Southwest
33000 Nixie Way, Building 50, Suite 326
San Diego, CA 92147-5110

Mr. Vincent Gonzales
SDG&E Sempra Energy
555 West Fifth Street, Suite 1400
Los Angeles, CA 90013-1011

Mr. Christopher J. McNevin
Attorney for Chevron USA Inc.
Pillsbury Winthrop Shaw Pittman, LLC
10250 Constellation Blvd., 21st Floor
Los Angeles, CA 90067-6221

Ms. Laura Hunter
San Diego Bay Council
c/o Environmental Health Coalition
1717 Kettner Blvd., No. 100
San Diego, CA 92101

Michael P. McCann, Supervising Engineer
San Diego Regional Water Quality
Control Board
9174 Sky Park Court, Suite 100
San Diego, CA 93123

ATTACHMENT 1

San Diego Daily T

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PO BOX 13308
SAN DIEGO CA 92170-9910

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Campbell lawsuit alleges Port changed deal

Suit seeks to invalidate lease

By TIM COFFEY
San Diego Daily Transcript

SAN DIEGO — **Campbell Industries**, the former leaseholder of a bayside property near the convention center, has filed a lawsuit against its former landlord, the San Diego Unified Port District, and current commissioners, claiming it was misled when the company agreed to terminate the lease in 1999.

The suit alleges the Port did not negotiate the agreement in good faith and withheld vital information that would have fundamentally changed the structure of the deal. Specifically, Campbell contends the Port knew more about the site's contamination from pollutants than acknowledged and knowingly encouraged the company to set a timetable for environmental remediation it could not meet.

Eight months after the agreement was signed, Campbell alleges, the Port made all preliminary remediation milestones final, denied a request for an extension, took over the project, and has withheld more than $6 million associated with the lease buyout and savings from completed remediation efforts.

Campbell, which filed the suit in San Diego County Superior Court late last month, seeks a ruling that would invalidate the lease termination agreement and award the company $6.2 million, plus interest, it says the Port has withheld for more than two years.

In addition to the Port and current commissioners, the suit named as defendants Thomas Morgan and Dennis Bouey, both former Port executives.

The former Campbell shipyard is a strategic bay-front property, near the remodeled end of the San Diego Convention Center. Since Campbell agreed to vacate the property in November 1999, the Port has had several discussions about leasing the site to hotel developers such as Doug Manchester and representatives of the **Hilton Hotels Corp.** (NYSE: HLT).

The Port's inability to make decisions has complicated the remediation process and has forced Campbell to take legal action, said H. Allen Fernstrom, president of the company.

"Since we started the project for the demolition and cleanup, the scope of the project has changed dramatically," he said, "and that's solely based on the Port's continuous change of the plans for the cleanup and the hotel development."

A copy of the lawsuit was delivered to the Port on Tuesday.

Rita Vandergaw, spokesperson for the Port, and Bouey, the immediate past director of the Port, both declined comment, saying they learned of the suit from a reporter. Morgan, another former Port executive, did not return phone calls seeking comment.

The lawsuit did not appear on the docket at Tuesday's Port commissioners meeting, either.

People associated with the Port said the lawsuit highlights a continuous issue for the organization that

See **Campbell** on 2A

Campbell —

Continued from Page 1A

oversees businesses and residential life in and along San Diego's bay.

"It's one of the largest remediation projects," said Richard Cloward, executive director of the Port Tenants Association, which represents tenants in real estate and environmental issues. "It's a two part project, too; a land side and a water side remediation. The land side has been done. The water side hasn't been done at all. It's defiantly a major project."

While the suit's defendants remained quiet, Campbell was on the offensive. Fernstrom and the firm's attorney Robert Howard of **Latham & Watkins** met for more than an hour with journalists of the *San Diego Daily Transcript* on Tuesday.

Fernstrom and Howard discussed the history of Campbell in San Diego, the shipyard, the termination agreement and current difficulties with the Port, the lawsuit, and what they hoped to get out of it. They were confident a judge would rule in their favor and talk about the lawsuit as the means to an end.

Campbell Industries is the offspring of Campbell Machine Works, a shipbuilding firm started here in 1906. For almost a century the firm built commercial fishing vessels from the bay front property. At the height of the business, Campbell had more than 20 buildings on site and a number of piers and berthing areas.

In 1979, just five years after signing a 40-year lease with the Port, Campbell was sold to Marine Construction & Design Co., or MARCO, a much larger competitor based in Seattle. Campbell's manufacturing operations were transferred to Chile in 1999, the same year the company's lease was terminated. It no longer operates here.

Plans to demolish the Campbell shipyard and create a hotel project were initiated by Campbell in the late 1980s, according Fernstrom. The executive said the company launched discussions with regional environmental regulators to define the scope of the remediation effort as a means to "jump-start" development.

A decade later, Campbell and the Port reached a lease termination agreement to void the final 14 years of the lease and pay Campbell a total of $16 million. The terms called for Campbell to take over two parcels of land, called the East and South parking lots, for remediation. The parcels had belonged to other former Port tenants including the city of San Diego and **Exxon Mobile Corp.** (NYSE: XOM).

According to Campbell, the Port assured the company the parcels required no additional remediation and a timetable for site cleanup was set at 14 months at a cost of $4 million. Campbell would pay for the remediation and demolition of the company's buildings, priced at $3 million. If the work cost less, Campbell was entitled to the difference.

The agreement also included a $9 million payment to Campbell, of which $3 million was received in 1999. The Port still has the remaining $6 million.

Less than a year after the termination agreement was signed, the Port denied Campbell an extension to the remediation efforts and claimed the company was in default of its obligations.

The Port has since revalued the remediation and now estimates it will take five years to clean the site, and cost $40 million, according to Campbell. The company alleges the Port knew that underground pollution from the other Port tenants would push the timetable back, denied the company an opportunity to seek money from the other tenants, and has refused the payment on fund owed.

"They encouraged us to enter into this very aggressive schedule and then when we asked for release saying: 'We need a few more months,' they said: 'No, we are deciding that the preliminary schedule is final and you guys are out of here,'" said Howard, Campbell's lawyer since the termination agreement was signed.

Howard expects the Port will file a countersuit.

If the Port countersues Campbell and wins, Fernstrom said Campbell would file bankruptcy since it doesn't have enough insurance or available cash to cover a financial settlement. The downturn in the tuna fishing industry forced the parent company to shift manufacturing from tuna vessels to tugboats. In June, MARCO sold its manufacturing division to a European partner.

Fernstrom said he attempted to contact Port officials several times in the last two years, but was often passed along to junior staff.

"After the last time, I said: 'That's it. I'm not talking anymore,'" he said.

tim.coffey@sddt.com

Source Code: 20030408tbb

ATTACHMENT 2

County Recorder
9/18/79 File/Page # 79-390698

AGREEMENT

FOR

SURRENDER AND TERMINATION OF LEASE

SAN DIEGO UNIFIED PORT DISTRICT
DOCUMENT NO. 72222
FILED SEP 11 1979
MICROFILM NO.
OFFICE OF THE CLERK

The parties to this Agreement are the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, (Lessor) and SAN DIEGO MARINE CONSTRUCTION CORP. (formerly MCCSD), a California corporation, (Lessee).

Recitals:

Lessor and Lessee entered into a written lease dated, July 14, 1972, (the lease) for premises which are San Diego Bay tidelands located in the City of San Diego, California. The lease is Document No. 6222, on file in the office of the Clerk of Lessor and particularly described in Exhibits "A" and "B", attached hereto and by this reference made a part hereof. The parties intend to terminate the lease by Lessee surrendering and vacating the premises and Lessor accepting such surrender and leasing the premises to a third party.

The Parties Agree:

1. The effective date of this Agreement shall be August 31, 1979, subject to the Lessor entering into and granting a new lease to Southwest Marine, Inc., a California corporation, for the same premises. In the event a new lease is not entered into and granted to Southwest Marine, Inc., a California corporation, this Agreement shall be null and void and of no force or effect.

2. Lessee surrenders the lease and Lessor accepts such surrender on the effective date of this Agreement. The lease shall be fully and finally surrendered and terminated on said effective date, subject to Paragraph 1, above. Lessee shall vacate said premises on said effective date.

14

3. Any remaining rights, duties or obligations of the parties pursuant to the terms, covenants and conditions in the lease shall continue in full force and effect and shall not be affected by this Agreement. Nothing herein is intended nor shall be construed as a waiver of any such rights or as a release of any such duties or obligations, whether known or unknown at this time or upon the effective date of this Agreement.

DATED: 9-14, 1979.

SAN DIEGO UNIFIED PORT DISTRICT

By _____
ASSISTANT Port Director

APPROVED as to form and legality
Port Attorney

JOSEPH D. PATELLO
Port Attorney

SAN DIEGO MARINE CONSTRUCTION CORP.

By _____
Title: PRES.

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

On this 14 day of SEPT., 1979, before me, a Notary Public in and for the County of San Diego, State of California, personally appeared GABRIEL S. GARRINA, known to me to be the ASSISTANT PORT DIR. of the San Diego Unified Port District, a public corporation, and known to me to be the person who executed the within instrument on behalf of said public corporation and acknowledged to me that such corporation executed the same.

OFFICIAL SEAL
SALLY LOMBARDO
NOTARY PUBLIC - CALIFORNIA
SAN DIEGO COUNTY
My comm. expires MAY 17, 1983

STATE OF CALIFORNIA)
COUNTY OF SAN DIEGO) ss.

On this 3rd day of August, 1979, before me, a Notary Public in and for the County of San Diego, State of California, personally appeared Peter B. Schmidt, known to me to be the President of San Diego Marine Construction Corp., a California corporation, and known to me to be the person who executed the within instrument on behalf of said corporation and acknowledged to me that such corporation executed the same.

OFFICIAL SEAL
VIRGINIA R. MAYBERRY
NOTARY PUBLIC - CALIFORNIA
PRINCIPAL OFFICE IN
SAN DIEGO COUNTY
My Commission Expires March 23, 1983

SAN DIEGO UNIFIED PORT DISTRICT

DOCUMENT NO. 17222
SEP 11 1979

ATTACHMENT 3

L E A S E

THIS LEASE, made and entered into this 1 day of September, 1979, between the SAN DIEGO UNIFIED PORT DISTRICT, a public corporation, hereinafter called "Lessor," and SOUTHWEST MARINE, INC., a California corporation, hereinafter called "Lessee," WITNESSETH:

Lessor, for the consideration hereinafter set forth, hereby leases to Lessee for the term and upon the conditions hereinafter set forth, a portion of those lands conveyed to the San Diego Unified Port District by that certain Act of Legislature of the State of California entitled "San Diego Unified Port District Act," Stats. 1962, 1st Ex. Sess., c. 67, as amended, which lands are more particularly described as follows:

> Approximately 836,378 square feet of tideland area in the City of San Diego, California, more particularly described and delineated on Drawing No. 2087-B revised July 27, 1979, attached hereto as Exhibits "A" and "B" and by this reference made a part hereof.

TO HAVE AND TO HOLD said leased premises for the term of this lease and upon the conditions as follows:

1. TERM: The term of the lease shall be for a period of thirty-nine (39) years, three (3) months, commencing on September 1, 1979, and ending on November 30, 2018, unless sooner terminated as herein provided.

2. RENT: Lessee agrees to pay to Lessor rent in accordance with the following schedules and procedures:

(a) The term of this lease shall be divided into a series of rental periods, each consisting of sixty (60) months, 15

ATTACHMENT 4

44. HAZARDOUS MATERIALS: Lessee shall comply with all laws regarding hazardous substances, materials or wastes, or petroleum products or fraction thereof (herein collectively referred to as "Contaminants") relative to occupancy and use of the leased premises. Lessee shall be liable and responsible for any Contaminants arising out of the occupancy or use of the leased premises by Lessee. Such liability and responsibility shall include, but not be limited to, (i)

removal from the leased premises any such Contaminants; (ii) removal from any area outside the leased premises, including but not limited to surface and groundwater, any such Contaminants generated as part of the operations on the leased premises; (iii) damages to persons, property and the leased premises; (iv) all claims resulting from those damages; (v) fines imposed by any governmental agency, and (vi) any other liability as provided by law. Lessee shall defend, indemnify and hold harmless the Lessor, its officials, officers, agents, and employees from any and all such responsibilities, damages, claims, fines, liabilities, including without limitation any costs, expenses and attorney's fees therefor. Lessor shall have a direct right of action against Lessee even if no third party has asserted a claim. Furthermore, Lessor shall have the right to assign said indemnity.

If Lessee has in the past or continues to use, dispose, generate, or store Contaminants on the leased premises, Lessor, or its designated representatives, at Lessor's sole discretion, may at any time during the term of this Lease, enter upon the leased premises and make any inspections, tests or measurements Lessor deems necessary in order to determine if a release of Contaminants has occurred. Lessor shall give Lessee a minimum of twenty-four (24) hours' notice in writing prior to conducting any inspections or tests, unless, in Lessor's sole judgment, circumstances require otherwise, and such tests shall be conducted in a manner so as to attempt to minimize any inconvenience and disruption to Lessee's operations. If such tests indicate a release of Contaminants, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense, and at any time during the term of this Lease, to have tests for such Contaminants conducted by a qualified party or parties on the leased premises. If Lessor has reason to believe that any Contaminants that originated from a release on the leased premises have contaminated any area outside the leased premises, including but not limited to surface and groundwater, then Lessor, at Lessor's sole discretion, may require Lessee, at Lessee's sole expense, and at any time during the term of this Lease, to have tests for such Contaminants conducted by a qualified party or parties on said area outside the leased premises.

The tests conducted by Lessee's qualified party shall include, but not be limited to, applicable comprehensive soil, emission, or groundwater sampling test or other procedures to determine any actual or possible contamination. Lessee shall expeditiously, but no longer than thirty (30) days after Lessor's request for such release. Lessee will be responsible for all fees and costs related to the unauthorized release of Contaminants including but not limited to investigative, surface and groundwater cleanup,

and expert and agency fees. Lessee shall maintain evidence of financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by a release from the underground tank system. Lessee further agrees to be responsible for maintenance and repair of the storage tanks, obtaining tank permits, filing a business plan with HMMD or other responsible agency and for paying underground storage tank fees, permit fees, and other regulatory agency fees relating to underground storage tanks.

Lessee agrees to keep complete and accurate records on the leased premises for a period of not less than thirty-six (36) months from the applicable events, including, but not limited to permit applications, monitoring, testing, equipment installation, repairing and closure of the underground storage tanks, and any unauthorized releases of Contaminants and make such records available for Lessor or responsible agency inspection. Lessee further agrees to include a copy of Health and Safety Code, Chapter 6.7, Section 25299, as part of any agreement between Lessee and any Operator of such underground storage tanks.

Furthermore, Lessee shall be responsible for compliance with all other laws and regulations presently existing or hereinafter enacted applicable to underground storage tanks, including without limitation any such laws and regulations which alter any of the above requirements.